IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2006 Session

TINA LOU RICHARDS v. JERRY ALAN RICHARDS

Appeal from the Circuit Court for Sevier County
No. 2002-0491-II Richard R. Vance, Judge

No. E2005-02924-COA-R3-CV - FILED JANUARY 25, 2007

Tina Lou Richards ("Mother") and Jerry Alan Richards ("Father") were divorced in February of 2003. At the time of the divorce, the parties agreed that they each would have physical custody of the parties' minor son on alternating weeks. Both Mother and Father subsequently filed petitions to modify the custody agreement. Each party claimed there had been a material change in circumstances justifying a change in the current custody arrangement. Following a trial, the Trial Court designated Mother as the primary residential parent and awarded Father standard co-parenting time. The Trial Court also ordered Father to pay child support and certain outstanding expenses incurred by Mother toward the child's care. The Trial Court also awarded Mother attorney fees. We reverse the Trial Court's modification of the original custody arrangement and reinstate that original arrangement. We also vacate the Trial Court's order as to child support, the payment by Father of expenses incurred by Mother, and the award of attorney fees to Mother, and remand this case to the Trial Court for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part and Vacated in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Robert W. White, Maryville, Tennessee, for the Appellant, Jerry Alan Richards.

Rebecca D. Slone and J. Derreck Whitson, Dandridge, Tennessee, for the Appellee Tina Lou Richards.

OPINION

Background

In July of 2002, Father filed a complaint seeking a divorce from Mother after a marriage lasting less than three years. The parties have one child, a six-year old son. The child is a hemophiliac which often makes otherwise routine childhood injuries much more serious. In February of 2003, the Trial Court entered an order granting each party a divorce from the other based upon stipulated grounds. The parties submitted to the Trial Court a Permanent Parenting Plan (the "Plan") which set forth two different co-parenting schedules depending on Father's work schedule. It appears, however, that the schedule the parties eventually came under was the one which provided for each parent to have physical custody of the child on alternating weeks. The Plan required the parties to divide equally any educational expenses and any medical bills not covered by health insurance. There is no mention in the record or in the briefs of either Father or Mother being ordered to pay any child support pursuant to the Plan.

In April of 2004, Mother filed a petition for modification of the custody arrangement. According to Mother, Father had not been exercising the full amount of his co-parenting time. Mother claimed Father's not exercising the full amount of his co-parenting time constituted a material change in circumstances. Mother requested that she be designated the child's primary residential parent, that Father receive minimal co-parenting time, and that Father be required to pay child support.

Father answered Mother's petition for modification and generally denied the pertinent allegations contained therein. Father later filed a petition also seeking to be designated the child's primary residential parent. In his petition, Father claimed there had been a material change in circumstances and that it was in the child's best interest for Father to be designated the primary residential parent. Father claimed that Mother consistently had denied him court-ordered co-parenting time. Father also claimed:

> That on October 8, 2004, the child was taken to Children's Hospital by mother due to an accident that occurred while the child was in mother's care. The child spent six days in the hospital - 3 days in intensive care. Father was told of this hospitalization by Parent Place.[1]

Following a hearing on the competing petitions for modification, the Trial Court entered an order designating Mother as the primary residential parent and grating Father standard co-parenting time. The Trial Court then ordered Father to pay child support in the amount of $733 per month. The Trial Court's order also states:

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[1] Father also acknowledged that the child was involved in an accident while in his care. This accident took place in May of 2004 and the child was hospitalized for four days.

> [I]t is ordered that the father will pay the child's medical bills, one half of school expenses, supervision fees, and babysitter's fees and [Mother's] attorney fees. This amount totals Eight Thousand Four Hundred Nine ($8,409.00) Dollars.

Father filed a timely notice of appeal and raises four issues. First, Father claims the Trial Court erred when it modified the existing custody arrangement whereby each parent had physical custody of the child on alternating weeks. Father also claims the Trial Court erred when it ordered him to pay the child's medical bills, school expenses, supervision fees, babysitting fees, and Mother's attorney fees. Next, Father claims the Trial Court erred in calculating his child support payment because the amount of his payment does not take into account that Father was paying child support for another child from a different relationship. Finally, Father claims the Trial Court erred when it failed to implement a new Parenting Plan.

Discussion

As noted, Father filed a timely notice of appeal. Because there was no court reporter present at the trial, no transcript is available. After filing a motion for extension of time to file a Statement of the Evidence, which was granted by this Court, Father filed a Statement of the Evidence on April 19, 2006. Pursuant to Tenn. R. App. P. 24(c), Mother was required to file any objections to the Statement of the Evidence within 15 days. More specifically, the pertinent portions of Tenn. R. App. P. 24 provide:

> (c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. – If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.

* * *

> (e) Correction or Modification of the Record. – If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.
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> (f) Approval of the Record by Trial Judge or Chancellor. – The trial judge shall approve the transcript or statement of the evidence and shall authenticate the exhibits as soon as practicable after the filing thereof or after the expiration of the 15-day period for objections by appellee, as the case may be, but in all events within 30 days after the expiration of said period for filing objections. Otherwise the transcript or statement of the evidence and the exhibits shall be deemed to have been approved and shall be so considered by the appellate court ….

Tenn. R. App. P. 24(c), (e), (f).

Mother did not file any objections to the Statement of the Evidence within 15 days and the record was transmitted to this Court without any objections. Father filed his brief with this Court on June 30, 2006. Mother's counsel then checked out the record on July 24, 2006, in order to prepare Mother's brief. Mother's brief was due on July 30, 2006. Mother then filed a motion for an extension of time to file her brief. We entered an order extending the time for Mother to file her brief until August 31, 2006. On the date Mother's brief was due, Mother did not file her brief but instead filed a Motion to Supplement the Record. Mother sought to have the record on appeal supplemented with her objections to Father's Statement of the Evidence filed by Father in April of 2006. We initially denied Mother's motion on September 21, 2006, stating:

> The appellee has now filed a motion to supplement the record to include an objection to the statement of evidence, which was not timely filed in the trial court. Because of the untimely filing of the objection to the statement of the evidence, no resolution as to the dispute has been made by the trial court in accordance with Tenn. R. App. P. 24(e). The affidavit attached to the motion acknowledges that the appellee knew the objection to the statement of the evidence had been filed and not resolved by the trial court. Yet, the appellee

> proceeded to let the briefing period run, the appellant to file his brief, and did not file a timely motion with this court to remand the issue to the trial court for disposition.

Three days before we entered the above order, the Trial Court signed an order directing the clerk of the trial court to transmit Mother's objections to the Statement of the Evidence to this Court. The Trial Court's order was entered one week after we initially denied Mother's motion to supplement the record. Mother then filed a renewed motion to supplement the record and indicated to this Court that the Trial Court had entered an order to supplement the record. Believing, incorrectly, that the Trial Court's order actually had resolved the conflict between Father's Statement of the Evidence and the objections to that Statement filed by Mother, we entered another order which granted the motion to supplement the record and directed the clerk of the trial court to certify to this Court a copy of the Trial Court's order and a copy of Mother's objections to the Statement of the Evidence. Mother then filed her brief on October 9, 2006.

Our understanding that the Trial Court had resolved the conflicts between the Statement of the Evidence filed by Father and the objections filed by Mother was incorrect. To this date, the conflicts have not been resolved by the Trial Court. We emphasize that Father's Statement of the Evidence was filed timely, Mother's objections were not filed timely, Mother did not file a timely motion seeking additional time to file her objections, and the Trial Court never has resolved the conflicts between these two documents, apparently because Mother's objections were not filed timely. We further emphasize that pursuant to Tenn. R. App. P. 24(f), if no objections are filed within 15 days and if the statement of the evidence has not otherwise been certified by the Trial Court within 30 days, the statement of the evidence "*shall* be deemed to have been approved." Tenn. R. App. P. 24(f)(emphasis added). Mother did not file her objections until after this 30 day period had expired. Therefore, in resolving this appeal, we accept Father's Statement of the Evidence as deemed to have been approved by the Trial Court, and we disregard Mother's late-filed objections thereto.

We first will discuss whether the Trial Court correctly modified the custody arrangement that was established when the parties were divorced. In *Kellett v. Stuart*, 206 S.W.3d 8 (Tenn. Ct. App. 2006) we stated:

> Existing custody arrangements are favored since children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or those which were reasonably foreseeable when the initial decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, our Supreme Court has held that a trial court may modify an award of child custody "when both a material change of circumstances has occurred and a change of custody is in the child's best interests." *See*

Kendrick v. Shoemake, 90 S.W.3d 566, 568 (Tenn. 2002). According to the *Kendrick* Court:

> As explained in *Blair [v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002)], the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 150. While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id.* (citations omitted).

Kendrick, 90 S.W.3d at 570. *See also* Tenn Code Ann. § 36-6-101(a)(2)(B) ("If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child….").

Kellett, 206 S.W.3d at 14-15.

With regard to whether there has been a material change in circumstances, the Statement of the Evidence provides:

> [M]other testified that [Father] did not exercise all of his co-parenting time that he was entitled to under the parenting plan which entitled the parties to substantially equal time.
>
> [Mother] further testified that the parties' minor child … was involved in an accident while he and some other children were playing, while in his father's care. She further stated that her son suffers from hemophilia. The incident required the child to … stay in the hospital … approximately one week. The child made a full recovery from the accident. The event occurred in May of 2004.
>
> [Mother] further testified that she was concerned that approximately one month later, after the aforementioned accident, the child was riding a four wheeler in the father's care.…

> [Father] testified that he had always tried to abide by the Permanent Parenting Plan in place from the time of the divorce and that [Mother] had consistently denied him co-parenting time with his son. He further stated that she had tried to make up excuses not to let him have time with the child, but that he never willingly refused to exercise his co-parenting time.…
>
> [Father] stated that the minor child had ridden a small all terrain vehicle a short time after this incident but that the child was supervised and wearing a helmet. [Father] stated that he was familiar with his son's condition of hemophilia, that he did not take it lightly and was responsible when supervising him.
>
> [Father] testified that he was not informed of an accident the child had while in the [Mother's] care where the child was hospitalized in October of 2004 and was in intensive care.

Mother's argument on appeal that she proved the existence of a material change in circumstances centers primarily around the fact that the child was hospitalized while in Father's care. When making this argument, Mother fails to mention that the child also was hospitalized after being injured while in *her* care. When considering the sparse record before us, we believe the facts preponderate against a conclusion that either party has proven a material change in circumstances. In other words, both Mother and Father failed to meet their burden of proof on this issue. Therefore, we reverse the Trial Court's judgment modifying the custody arrangement and reinstate the terms of the Permanent Parenting Plan as originally adopted by the Trial Court when the divorce was approved, *i.e.*, each parent having physical custody of the child on alternating weeks.[2]

The next issue is Father's claim that the Trial Court incorrectly determined his child support payment when it failed to consider Father's child support payment for another child. Because we have reversed the Trial Court's custody modification and reinstated the original Plan, it necessarily follows that the child support order must be vacated. On remand, the Trial Court is to determine whether either of the parties has an obligation under the child support guidelines to pay child support to the other party under the custody arrangement as set forth in the original Plan and when considering all factors made relevant by the child support guidelines.

The next issue is Father's claim that the Trial Court erred when it awarded Mother a judgment in the amount of $8,409 for the child's medical bills, one half of school expenses, supervision fees, and babysitter's fees and Mother's attorney fees. We also vacate this portion of the judgment. On remand, the Trial Court is to determine the amount of money Father owes to

[2] We need not determine whether a change in the custody arrangement was in the child's best interest because that analysis is undertaken only if a material change in circumstances has been proven. *See Kellett*, 208 S.W.3d at 15.

Mother for these expenses under the original Plan. The attorney fee award likewise is vacated and, on remand, the Trial Court is to reconsider the award of attorney fees in light of this Opinion.

The final issue is Father's claim that the Trial Court erred when it failed to implement a new Permanency Plan after modifying the original custody arrangement. Because we have reinstated the original Plan, this issue is now moot.

Conclusion

The judgment of the Trial Court is reversed in part and vacated in part. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, Tina Lou Richards.

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D. MICHAEL SWINEY, JUDGE